

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:
NATIONAL PRESCRIPTION
OPIATE LITIGATION

Case No. 1:17MD2804
Cleveland, Ohio

June 25, 2019
12:02 p.m.

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TRANSCRIPT OF STATUS CONFERENCE PROCEEDINGS
BEFORE THE HONORABLE DAN A. POLSTER,
UNITED STATES DISTRICT JUDGE, AND
DAVID A. RUIZ, UNITED STATES MAGISTRATE JUDGE.

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18 ALSO PRESENT:

19 Special Master David Cohen
Special Master Francis McGovern
Special Master Cathy Yanni

20
21 Proceedings recorded by mechanical stenography;
22 transcript produced by computer-aided transcription.
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1 TUESDAY, JUNE 25, 2019, 12:02 P.M.

2 THE COURT: All right. Good afternoon.

3 Please be seated.

4 All right. This is a hearing on

12:03:01 5 plaintiffs' motion to conditionally certify and send
6 notice for a negotiation class.

7 We have obviously a lot of counsel, media
8 present in the courtroom, and on the telephone.

9 I want to explain to members of the media
12:03:23 10 why this is -- this proceeding is in public and some
11 others haven't.

12 The same rules apply to the Opioid MDL as
13 any other case in federal court. If I'm holding a
14 hearing on a motion, and whether that hearing requires
12:03:43 15 the taking of testimony, oral testimony and/or arguments
16 of counsel, that's going to be in public.

17 If I have the typical status conference,
18 case management conference that all Judges have with the
19 lawyers and parties on a case, and that's done in
12:04:03 20 chambers, typically -- that's how I do them; I think
21 that's how every Judge in the country does them -- those
22 are never public events.

23 If I have to use the courtroom because
24 that's the only room where I can accommodate all the
12:04:18 25 lawyers who need to be there, that doesn't change the

1 nature of the proceeding from a private one to a public
2 one. And of course, as with any case, any time there's
3 settlement discussions, those are never public.

4 So that's why this hearing, since it is a
12:04:33 5 hearing on a motion, is in public and that's why, I
6 think, the last time I had a hearing on a motion, there
7 was a motion to disqualify, that was in public, open
8 court, and the media was present.

9 I want to say a few things at the outset.
12:04:53 10 I've been asked by my colleagues on the Judicial Panel
11 for Multi-District Litigation to oversee what many have
12 called the most complex constellation of cases that have
13 ever been filed.

14 We now have nearly 2,000 cases in Federal
12:05:11 15 Court, and hundreds more in State Courts brought
16 primarily by cities, counties, Native American tribes,
17 and a number of our state Attorneys General against the
18 manufacturers and distributors of prescription opioids
19 seeking to hold these corporations accountable for the
12:05:33 20 scourge of addiction and death that has cut across all
21 communities, races and classes.

22 My opinion is that to be justiciable, a
23 case must be capable of being tried in a courtroom. It
24 also must be capable of being settled, if the parties
12:05:51 25 want to settle it. If not, the case doesn't belong in

1 court, whether State or Federal.

2 Obviously every city and county in our
3 country is part of a state, and every one of the citizens
4 of every city and county, they are also citizens of a
12:06:11 5 state. Each of our 50 Attorney General -- Attorneys
6 General has either filed a case in this opioid situation,
7 or is actively pursuing an investigation that may lead to
8 filing a case.

9 And some Attorneys General have filed more
12:06:27 10 than one case. I believe in Ohio there are at least two.

11 I think everyone understands why cities and
12 counties have filed their own cases. It's the legacy of
13 the tobacco settlement when most of the \$200 billion that
14 was paid by tobacco manufacturers did not go toward
12:06:49 15 reducing smoking and treating lung cancer. It was used
16 by state legislators for other state purposes. They may
17 have been very worthy, I'm not meaning to suggest they
18 weren't, but they did not go toward addressing the reason
19 the cases were filed.

12:07:06 20 And candidly, some of this is being played
21 out right now in Oklahoma. I read just today that
22 through the help of a mediator, the Attorney General and
23 the legislators have figured out a mechanism to ensure
24 that while any money that is received in settlement and
12:07:27 25 has been paid in settlement by two of the defendants will

1 be under the control of the state legislature, that money
2 will be used only toward combatting the opioid crisis in
3 that state. And there's a mechanism that's been created
4 just for that.

12:07:44 5 I think I said at the very outset of this
6 MDL, in January of 2018, that developing solutions to
7 combat a social crisis such as the opioid epidemic should
8 not be the task of our judicial branch; either our
9 federal judiciary, or our state judiciary.

12:08:05 10 It's the job of the executive and
11 legislative branches, but like it or not we have these
12 cases. And I've been given the task of managing them in
13 a way that is fair both to the plaintiffs and to the
14 defendants, and in a manner that doesn't cause our state
12:08:23 15 and federal judiciaries to crash.

16 Nobody has the ability to -- or the
17 capability to try all of these cases, which means the
18 vast majority need to be settled or dismissed.

19 Now, I know the defendants want me to
12:08:39 20 dismiss them all, and they've filed a number of motions
21 already, and I expect by the Friday deadline we'll get a
22 lot more. And I'll have to address these motions.

23 As for settlement, the only thing everyone
24 has agreed upon is that the cases cannot be settled
12:09:00 25 piecemeal, one at a time. And no one can settle the

1 state cases without settling the city and county cases,
2 and tribe cases, and no one can settle those cases
3 without settling the state cases, and they cannot be
4 settled one by one by one.

12:09:17 5 The defendants have made it clear that they
6 would not consider settlement if they can't get closure,
7 and I don't disagree with them. I would feel the same
8 way.

9 So if that is to happen, there needs to be
12:09:29 10 a vehicle to do it. The negotiation class that has been
11 presented by the plaintiffs' motion is a novel idea. It
12 has never been tried, but that doesn't make it wrong or
13 illegal or incorrect. There's never been a constellation
14 of cases like this, so to settle them requires a novel
12:09:54 15 approach.

16 I have encouraged all ideas. I've never
17 shot one down because even if one idea, say what seems a
18 little strange, it may have something in there that
19 produces another idea.

12:10:11 20 All right. We need novel solutions to a
21 novel problem.

22 And the plaintiffs have not claimed by
23 presenting this that this is the only structure or a
24 perfect structure, all right, or that any defendant must
12:10:26 25 use it. They've put it out there as a possibility, the

1 best one that they could come up with.

2 And I'm very well aware that other
3 structures are being actively discussed, and I encourage
4 that.

12:10:42 5 So the states really don't need a structure
6 to settle their cases. I mean, there is a model, the
7 consent decree. Each state can have a consent decree in
8 its state. You can have 50 identical consent decrees or
9 maybe little variations. That's relatively simple.

12:10:59 10 That's been done before.

11 Okay. What we need is a structure to deal
12 with not only the roughly 2,000 city and county
13 subdivision cases that have been filed, but potentially
14 there are 20,000 other subdivisions out there who could
12:11:14 15 file cases.

16 So everyone, the plaintiffs, the
17 defendants, and the Attorneys General, have an incentive
18 to develop an effective structure. And I welcome all
19 ideas and all suggestions. And I very much welcome the
12:11:34 20 fact that all 50 Attorneys General have been willing to
21 work with me.

22 I asked for their help at the beginning,
23 and to a man and woman, each of them has pledged their
24 assistance. And I've met with many of them, and I've met
12:11:51 25 with many of their first assistants and their able

1 colleagues in their offices, and they are working very
2 hard because they recognize that no one can settle these
3 cases without everyone's assistance.

4 So I understand that the parties have had
12:12:06 5 some discussion about how we can proceed with this motion
6 and how we can do it in a way that involves input from
7 everyone as opposed to in a typical adversarial posture.

8 I know that there have been various filings
9 already. These are the ones which I've received. There
12:12:37 10 may have been others. But I know we've received a
11 memorandum of certain defendants in opposition to
12 plaintiffs' motion for certification that was filed June
13 24th.

14 We also had certain pharmacy defendants'
12:12:54 15 objections. That was filed June 24th.

16 And also, yesterday I received two letters
17 from a substantial number, I think 24 to 26 Attorneys
18 General and I've had both of those letters filed. They
19 are both dated June 24th.

12:13:13 20 And I have reviewed them. I'm sure
21 everyone has. And again, I welcome some of the input of
22 the distributors and I certainly welcome the input, the
23 considered input of all of the Attorneys General.

24 So I understand the parties have had some
12:13:32 25 discussion about how we should proceed.

1 So yes.

2 MR. GELLER: Good afternoon, Your Honor.

3 Paul Geller from Robbins Geller for the PEC.

4 SPECIAL MASTER COHEN: Would you speak into
12:13:47 5 the microphone?

6 THE COURT: Paul, I know it's the protocol
7 to stand.

8 MR. GELLER: I'll sit.

9 THE COURT: But the way our sound system
12:13:54 10 works, it works much better if you're sitting.

11 So we'll dispense with the normal standing.
12 I'd ask everyone to sit and speak into the mic.

13 Thank you.

14 MR. GELLER: Your Honor, Elizabeth Cabraser
12:14:06 15 and I have been asked by lead counsel to present this
16 motion and go through the Rule 23 analysis for this novel
17 idea.

18 But as Your Honor pointed out, yesterday we
19 heard from the State AGs, several of them; we saw the
12:14:24 20 objections from the distributor defendants and the
21 pharmacy defendants; and we've also heard from other
22 plaintiffs' lawyers who represent entities that would be
23 class members in State Courts, all of whom had some
24 comments and some thoughts, some of them more doctrinal,
12:14:48 25 some of them practical, but all of them we felt like we

1 can deal with and we can make some adjustments.

2 And so with Your Honor's indulgence, we
3 would ask that rather than ruling on the motion today, we
4 give the states the more time that they want, but not
12:15:05 5 exactly the way they request.

6 What we would propose is that two weeks
7 from now we would file a revised motion and then anybody,
8 the states, defendants and anybody else, would then have
9 two weeks after that to file any opposition or any
12:15:25 10 commentary, which would bring us to July 23rd,
11 thereabouts.

12 Then we would ask for another week to file
13 a reply brief, after which the renewed motion for the
14 certification of the negotiating class would be fully
12:15:42 15 briefed before the Court, and if the Court wanted to
16 entertain a hearing, we would ask you to schedule one as
17 quickly as the schedule permits.

18 And we would hope that if the class were
19 certified, notice would go out and class members would
12:16:01 20 then have an opportunity to opt out, which we would set
21 forth in our briefing.

22 I know, you know, we feel strongly that
23 consistent with everything that you said, this is, while
24 somewhat novel, I don't think it's quite as adventurous
12:16:20 25 as some others have commented, but it's simply an effort

1 to create an opportunity and an option for defendants if
2 they so choose to negotiate.

3 And my colleague Elizabeth Cabraser wanted
4 to add some more to this, but rather than present our
12:16:35 5 motion today, we ask to take it a couple weeks from now.

6 THE COURT: All right. Thank you,
7 Mr. Geller.

8 Ms. Cabraser.

9 MS. CABRASER: Good afternoon, Your Honor.
12:16:46 10 Elizabeth Cabraser on behalf of the PEC.

11 One of the -- one of the innovative
12 features that we built into our motion was essentially a
13 preview opportunity so that all of the parties to the MDL
14 and the Attorneys General would have notice of this
12:17:02 15 hearing, even though it was styled a preliminary hearing,
16 and would have the opportunity both formally and
17 informally to provide comment and input.

18 And we did that for a reason. And the
19 reason was we intended to take that input seriously. And
12:17:17 20 we wanted to know, before we got too far down the road on
21 this, what the concerns were, were there details we
22 should attend to, and how to make this work, because the
23 concept is a large concept, but operationally things work
24 or don't work through attention to detail.

12:17:35 25 And as a result of that process, we did

1 hear from cities and counties represented by counsel in
2 State Court and otherwise with some very good ideas for
3 improvement, with some correction to detail.

4 We heard from cities and counties who
12:17:52 5 wished to serve as additional proposed class
6 representatives.

7 We have heard from cities and counties
8 themselves that we should refine the class list to make
9 it completely inclusive and also to address the
12:18:10 10 particularities of some city and county organizations in
11 some states, all of which we are in the process of doing.

12 So that if the Court certifies the class
13 and allows formal notice to proceed, and, indeed, in
14 advance of that, as people preview this motion, class
12:18:29 15 members will see a complete and inclusive list.

16 The Census Bureau keeps different lists and
17 those need to be put together, which we're doing, for
18 example, to include, at their request, municipalities in
19 Puerto Rico.

12:18:43 20 So this schedule gives an additional chance
21 for input.

22 It gives us the opportunity to address the
23 input we've received so far, to incorporate many ideas,
24 and to improve and refine the motion.

12:18:59 25 And also, to give time to the Attorneys

1 General, as they requested, to both attend to settlement
2 initiatives and for further briefing.

3 Thank you, Your Honor.

4 THE COURT: All right. Thank you.

12:19:13 5 So if I understand, the plaintiffs'
6 proposal is that to give the plaintiffs until July 9th to
7 consider all the input they have received from the
8 states, the distributors, cities, counties, and input
9 they may continue to get, and they will by that date file
12:19:41 10 an amended motion.

11 And then by July the 23rd, after again I'm
12 sure there will be a lot of discussion, at that point any
13 state and any AG or group of AGs who want to file any
14 objections, comments, whatever, or any defendants who
12:20:01 15 want to file any objections or comments would do so, and
16 then July 30th the plaintiffs would file a response.

17 And if we follow that, my intent would be
18 to hold a hearing on Tuesday, August the 6th at 10:00
19 a.m. And I would most likely make a decision at that
12:20:26 20 point, and obviously listen to anyone who wants to appear
21 and say anything.

22 So that's the proposal.

23 Does anyone -- is there anyone who has, you
24 know, who has any, any principal problem or objection to
12:20:44 25 that proposal? I certainly would hear from him or her.

1 That is a proposal. I can say the Court
2 always -- we've got the best lawyers in the country here
3 on both sides, and I'm always in favor of letting the
4 best lawyers in the country have an opportunity to think
12:21:02 5 about something complex a little longer.

6 But I certainly want to give anyone who
7 thinks there's a problem with this an opportunity to
8 respond or say anything.

9 I could give that -- I think the people on
12:21:19 10 the phone are muted so I don't think I can give those
11 folks on the phone the opportunity to speak, or else
12 thinks would really crash, but if anyone is here who
13 wants to say anything, that's fine.

14 (Pause) .

12:21:38 15 THE COURT: All right. Well, I take it by
16 the silence that no one has any violent disagreement
17 because my experience is in this case, if someone has a
18 real problem with what's going on, no one's been too shy
19 on either side.

12:21:50 20 So I will adopt that suggestion, and I
21 think I'll just say by noon on July 29th the plaintiffs
22 are to file an amended motion.

23 MR. WEINBERGER: July 9th? July 9th, Your
24 Honor?

12:22:09 25 THE COURT: July 9th.

1 And I would encourage, you know, any
2 Attorney General or any defendant or any city or county
3 who has input to get that to, I guess Mr. Geller and
4 Ms. Cabraser are the principals -- they will be
12:22:29 5 shepherding this -- to engage in dialogue with them. And
6 they will file something by July 9th.

7 And then by noon on July 23rd, I think any
8 party, any party to the case who wants to file a response
9 or objection should do so.

12:22:49 10 The Attorneys General are not parties so I
11 think they're welcome to do their response comment the
12 same way by letter, and obviously I will file any letter
13 I get from any Attorney General or group of Attorneys
14 General the day or the next day that we get it.

12:23:09 15 And then by noon on July 30th the
16 plaintiffs are to file any response, which could be a
17 response or could be a further amendment.

18 And then I will have a hearing on the
19 latest proposal that the plaintiffs had Tuesday, August
12:23:30 20 the 6th, at 10:00 a.m. And that, of course, will be in
21 public. We'll arrange for anyone to at least listen in.
22 And, of course, anyone who wants to appear, can appear
23 and say anything they wish.

24 And my -- I intend that I will make -- make
12:23:50 25 a decision either at that hearing or very shortly

1 thereafter.

2 Obviously if something -- someone says
3 something on the 6th that causes me to reflect, I'll
4 certainly do so. That's the point of a hearing. But my
12:24:04 5 plan is to make a decision that day or very shortly
6 thereafter.

7 So again I want to express the Court's
8 appreciation for all the hard work that went into the
9 plaintiffs' motion and proposal. It was a product of a
12:24:22 10 great deal of work by a lot of fine people.

11 And I know -- I know that, and I express my
12 appreciation to all the people who reacted on very short
13 notice on the defendants' side and the State AGs with a
14 lot of thoughtful comments.

12:24:43 15 And the fact that everyone wants to take a
16 little more time is good.

17 So I'll get out a short order to this
18 effect, and then I guess I'll see anyone who wants to
19 appear on Tuesday, August 6th.

12:25:00 20 So unless anyone else has anything more to
21 say, that concludes this hearing.

22 Now, we had set what we've been calling a
23 roadmap discussion where each side can give the Court
24 some guidance as to how to deal with the substantive
12:25:27 25 motions that have been filed and are due to be filed this

1 Friday, and I had set that to begin at 2:00 o'clock.

2 Now, I know many of the same people are
3 going to be here, and I don't have a problem with
4 starting that at 1:00 o'clock, but I don't want to mess
12:25:45 5 anyone up. But I think since we've got so many people
6 here, we don't need -- I didn't know how long this
7 hearing was going to take for that matter, and that's why
8 I gave a two-hour break.

9 So, yes, Mr. Lanier.

12:26:10 10 MR. LANIER: Yes, Your Honor. Mark Lanier
11 for the plaintiffs.

12 We're ready to commence whenever the Court
13 is.

14 MR. CHEFFO: Your Honor, same here. 1:00
12:26:17 15 o'clock sounds great to us.

16 THE COURT: All right. I think I'd like,
17 you know, people can get a quick something to eat and
18 then we'll start promptly at 1:00 o'clock, and that will
19 be fine.

12:26:26 20 So this hearing is adjourned and the next
21 one will begin at 1:00 o'clock.

22 MS. CABRASER: Your Honor.

23 THE COURT: Yes. Wait a second.

24 Yes, Ms. Cabraser.

12:26:37 25 MS. CABRASER: Yes. One housekeeping

1 matter on the negotiation class motion.

2 As the original motion has stated and as we
3 will continue to do, all papers that are filed in
4 connection with the ongoing motion practice will be
12:26:51 5 posted on the website OpioidsNegotiationClass.com.

6 And any potential class member or anyone
7 who has an informal comment or suggestion that they want
8 to make directly can go to
9 info@OpioidsNegotiationClass.info to send that in. And
12:27:13 10 that's, in fact, how we got several very useful technical
11 suggestions from cities and counties themselves.

12 So it's an open process.

13 THE COURT: All right. That's excellent.

14 MS. CABRASER: And it's online.

12:27:25 15 THE COURT: Do you -- do you think the
16 letters from the State AG, can you post those on the
17 website?

18 MS. CABRASER: With the Court's
19 authorization --

12:27:32 20 THE COURT: Yes.

21 MS. CABRASER: -- as -- and the AG's
22 permission, we will do that.

23 THE COURT: All right. I can't imagine
24 they would object. I mean, they are on, they have been
12:27:40 25 publicly filed. I told the AGs that that's what I would

1 do.

2 So I think they should be. Let everyone be
3 able to see the very thoughtful comments that the AGs
4 made.

12:27:53

5 So thank you.

6 Okay. Thank you.

7 THE CLERK: All rise.

8 (Proceedings concluded at 12:27 p.m.)

9 - - - -

10 C E R T I F I C A T E

11 I certify that the foregoing is a correct
12 transcript from the record of proceedings in the
13 above-entitled matter.

14

15

16

17 /s/Susan Trischan

18 /S/ Susan Trischan, Official Court Reporter

19 Certified Realtime Reporter

20

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